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INTERSTATE COMMERCE—ORIGINAL PACKAGES OF CIGARETTES. —*Austin* v. *State of Tennessee*, 179 U. S. 343 (1900). The defendant was convicted under a Tennessee statute, which provided that no person should sell, or bring into the state for the purpose of selling, any cigarettes. He had ordered a consignment of cigarettes from a manufacturer in North Carolina. They were packed in pasteboard boxes 3x1½ inches in size, each box containing ten cigarettes, and without any shipping address. For safety and convenience in transportation, these boxes or packages were carried in large, open baskets owned by the express company, and emptied on the counter at defendant's place of business. For the sale of a package, defendant was convicted.

The main question in the case was whether or not the defendant had sold an original package. The majority of the court, on grounds of public policy and to prevent a fraudulent evasion of statutes, defined an original package to be one of the size generally used in *bona fide* interstate transactions, and not the one in which the importation is actually made. "The whole theory of the exemption of the original package from the operation of state laws is based upon the idea that the property is imported in the ordinary form in which, from time immemorial, foreign goods have been brought into the country." But taking the words "original package" in their literal sense, manufacturers, by shipping in minute packages that go at once to retail dealers and consumers, evade the prohibitory laws of the states. If the original package is that imported separately and loosely, then beer would be exempt from state laws, whether shipped in hogsheads or vials; cigarettes sent in an importer's case or singly; "anything from a bale of merchandise to a single ribbon, provided only the dealer sees fit to purchase his stock outside the state and import it in minute quantities." Therefore the original package, if any there be in this case, is the basket and not the paper box.

This conclusion was vigorously dissented from by four judges. It being conceded, that Congress has exclusive control over interstate commerce, and that no state under its police power can directly restrain such commerce, how can the size of the package or the manner of importation determine the limit of national control? How can a state prevent the importation and sale of a pint of whisky and not that of a barrel? The state either has the power to prohibt, whatever the size of the package, or it has no power, and the matter is to be left solely to Congress. If Congress has not prescribed the package in which the importation and sale are to be made, the importer can fix it to suit himself.

The law of original packages began with *Brown* v. *Maryland*, 12 Wheat. 419 (1827), in which a statute of Maryland, requiring all importers of foreign articles "by bale or package" or of intoxicating liquors "by hogshead, barrel or tierce" to pay a license, was held unconstitutional. Marshall conceded that the state could tax when the importer had so acted upon the thing imported that it had lost its distinctive character as an export, "but while remaining the property of the importer in his warehouse, *in the original form or package in which it was imported*, a tax upon it is too plainly a duty on imports to escape the prohibition of the constitution." This decision applied to foreign imports only. In *Woodruff* v. *Parham*, 8 Wall, 123 (1868), a statute of Alabama, authorizing a tax on sales at auction, was held applicable to goods of another state, though sold in the original and unbroken package. In *Brown* v. *Houston*, 114 U. S. 622 (1884), the court said, "With the exception of goods imported from foreign countries, still in the original packages, and goods in transit to some other place, why may not he (the assessor) assess all property alike that may be found in the city, being there for the purpose of remaining there until used or sold, and constituting part of the great mass of commercial capital—provided, always,

that the assessment be a general one." This distinction between foreign and state imports was later abolished. In *Leisy* v. *Hardin*, 135 U. S. 100 (1889), it was held that a state could not prohibit the importation and sale, from abroad or from a sister state, of intoxicating liquors, and that they did not become a part of the common mass of property within the state so long as they remained in the casks in which they were imported. In the case of *Schollenberger* v. *Pa.*, 171 U. S. 1 (1897), the statute had no force to prevent a sale of oleomargarine imported and sold in packages of ten pounds weight; such package being of the form, size and weight customarily adopted by importers, and there being no evidence of a design to evade the statute.

Much reliance was placed by the court on the case of *May* v. *New Orleans*, 178 U. S. 496 (1899). There the goods were put up and sold in packages, a large number of them being inclosed in wooden cases for transportation. Upon arrival at New Orleans the packages were taken out and sold unbroken. The original package was held to be not the package, but the wooden case, and the sale was taxable. Unless an open basket owned by the express company can be classed as an inclosed case, there is a reasonable distinction between the facts of the two cases. The open basket is in the same category as the express car and express wagon. The three are simply a convenient means of shipping the cigarette packages singly. It is admitted that there must be some kind of an original package, and it seems equally true that it must be inclosed. Where, then, was the original package if the cigarette package cannot be considered so? The majority court says, if there is any, it is the open basket. The surest ground of the decision is to regard the defendant's method as a trick and evasion of the statute.

Several Pennsylvania cases were cited to support the majority view, but, on examination, it appears that the goods were shipped in boxes or barrels inclosed, and sold in small quantities. See *Comm.* v. *Zelt*, 138 Pa. 615–639 (1890); *Comm.* v. *Paul*, 170 Pa. 284 (1895); in this last case, however, a small tub of oleomargarine, containing ten pounds, in which the importation was made, was held to be not an original package. In Iowa, *McGregor* v. *Cone*, 104 Iowa, 465 (1898), packages of cigarettes of the same size as those involved in the case under consideration were imported in closed pine boxes. A sale of a package was held to be within the statute.

Importations of cigarette packages, containing ten cigarettes, have been made, each package separate and loose from the other, and without any other wrapping, and the importation and sale have been declared not subject to prohibitory state legislation: *In re Minor*, 69 Fed. 233 (1895.) A strong decision on this point is *Guckenheimer* v. *Sellers*, 81 Fed. 998 (1897).

F. K. S.

CIVIL LAW.—Parallels to *Peuker* v. *Canter*, 63 Pac. 617. (See AMERICAN LAW REGISTER, April, 1901, p. 238.) Perhaps your readers may have noticed the close Roman parallels to the "*novel*

and interesting circumstances" which you report (April, 1901, p. 238) in the Kansas case of *Peuker* v. *Canter*.

The full report of a Roman case in alluvion decided by Alfenus Varus (First Century B. C.) may be found in Justinian's "Digest," lib. 41, title 1, fragm. 38. The circumstances were as follows: *Attius* was (1) separated from the river by a public highway and by land (not his) lying between the highway and the river, *i. e.*, had no riparian rights; (2) the river erodes the land up to and finally across the public highway (at this point Alfenus *held* that the new land formed on the farther side of the river has acceded by alluvion to the [non-submerged] land touching the river on that side); (3) then the river gradually receded until it regained its *original* position. Alfenus *held* that the alluvial increase now goes by accession to *Attius*.

This decision conformed to the Roman *strict law* rules: (1) that the *actual* bed of the river is *state* property, and incapable of private ownership; (2) that *alluvium* accedes to contiguous (*i. e.*, non-submerged) land, as accessory thing to principal thing; and, (3) that the course of nature having consumed all the original principal land upon one side, the land *behind* that has become the principal thing. (That the erosion must be *strictly* alluvial is shown by the statement of Pomponius [Dig. 41, 1, 30, 3], that *eodem impetu fluminis restitutus* [*ager*] goes to the original owner of the overflowed land. This view is affirmed by Gaius [Dig. 41, 1, 7, 6].)

I use above the qualifying term "*strict law*," for some considerable opposition to the full legal consequences of the *third* rule is shown in a *text-book* statement of Gaius (Dig. 41, 1, 7, 5). In the case there contemplated, the river also, in abandoning its original bed, *completely* consumes *A.'s* land and with its bed occupies the space previously held by that land. (It will be understood that I am speaking from the *civilian* standpoint.) Later it also returns to its original bed. Gaius says that "*stricta ratione*" *A.* would lose all title (*i. e.*, in *strict* law Alfenus would be right); but Gaius adds the significant words "*vix est ut id obtineat*" ("this would hardly obtain"). Unfortunately Gaius pursues this line no further, and we are left to inference as to whether he contemplated an *equitable* recovery by *A.* of the *whole*, or of a *portion*, which latter seems, from your report, to be decided, in the case of *Peuker* v. *Canter*, by the Supreme Court of Kansas (leaving to the lower court to determine what the equitable proportion should be).

Edgar S. Shumway.